REVIEW

OF THE

DECISION OF THE U. S. SUPREME COURT,

IN THE CASES OF

LAMBDIN P. MILLIGAN AND OTHERS,

THE

INDIANA CONSPIRATORS.

PUBLISHED BY THE UNION CONGRESSIONAL EXECUTIVE COMMITTEE, WASHINGTON, D. C.

CHRONICLE PRINT.
1867.

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INTRODUCTION.

The following review of the decision of the Supreme Court of the United States on the petition of Lambdin P. Milligan, *et al.*, to be discharged from an alleged unlawful imprisonment, originally appeared in the editorial columns of the WASHINGTON DAILY CHRONICLE. In its statement of facts it has strict official accuracy, and, in its treatment of the legal and political principles involved, it is believed to present a complete refutation of the reasoning by which the decision of the majority of the Court was sought to be sustained.

The failure of the Court to confront these facts or take any cognizance of them, together with their incomplete comprehension of the magnitude of the subject, of the vast interests at stake, and the far-reaching results sure to flow from their action, is submitted for the consideration of a loyal people, in the earnest hope that they may be aroused to the new danger threatening the nation.

We go to the country upon the issue now made, between the decision of the Supreme Court and those who supported the war for the suppression of the slaveholders' rebellion; confident in the abiding faith that error alone can suffer by discussion, and that a cause which draws its weapons from the grand armory of truth will gain an advocate in every loyal patriot who is furnished the means of understanding the question. In the ascertainment of public opinion upon this issue, every citizen is called upon to say, virtually, whether or not he is in favor of undoing the great work of the war; and whether or not he will willingly see the attitude of the parties to the conflict reversed, and those declared to have been criminals, who cheerfully perished that their country might survive.

It is the vaunted hope, as it is the manifest design, of those interested in the effort now being made to destroy the living and malign the dead who have employed military courts as instrumentalities in putting down the great insurrection, to retaliate with fierce vengeance upon the public officers who punished with those agencies the abettors of treason.

The menace has been proclaimed that the honest and fearless men who tried and executed some of the most wicked criminals that the world has produced, may, before another year comes around, be "howling at the cart's tail under the lash of the public executioner."

This threat was uttered in a public speech by the most clamorous of the champions of the decision of the Court, and in ecstatic contemplation

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of the consequences to loyal men, which he and other sympathizers with the rebellion hope and doubtless pray may follow from that decision.

The notorious VALLANDIGHAM likewise, has caught up and echoed the jubilant shout of welcome to a judgment which he deems his own vindication. In the course of a long letter on the political situation, addressed to the editor of the La Crosse DEMOCRAT, and dated Dayton, Ohio, January 3, 1867, he says:

"Meantime, however, deriving such satisfaction—and it is both great and sweet—as springs from the recent decisions of the Supreme Court of the United States, convicting Abraham Lincoln and his administration of high crime against the Constitution and public and private liberty, I confine myself chiefly—having no cabbage garden to cultivate, especially during the present cold snap—to the studies and labors of my profession, and am content just now to look on in politics, and await with faith and patience the work of 'time, the corrector and avenger.'"

It is for the American people to decide whether these menaces shall be realized.

It is for the American people to determine whether the fruits of victory shall be basely frittered away; whether the intrepid spirits who took justifiable responsibilities to save the Union, shall now be branded as felons by the decision of a tribunal which, though created by the American people, and existing only as their representative and servant, is now, by the absolute despotism of a single vote, overriding and trampling down the most solemn convictions ever entertained by any nation, and upon issues deeply affecting the honor, as they do the future life, of the republic.

THE DECISION OF THE SUPREME COURT IN THE INDIANA CASE—ITS SUPPRESSION OF FACTS.

The recent decision of the majority (5) of the Supreme Court in the case of the Indiana conspirators, as rendered by Mr. Justice Davis, to the effect that the military commission, by which these criminals and traitors were tried and convicted, was a court without jurisdiction, rests upon these grounds: 1. That such a tribunal was not authorized by the Constitution; and 2. That it was not authorized by the law of war, inasmuch as that law had no operation in the State of Indiana.

The position taken by Judge Davis, that the law of war, or, as he loosely terms it, "martial law," did not extend to Indiana at the time of the arrest and trial of Milligan and his associates, is based upon so strange an ignorance or misconception of the state of public affairs in that region, at the time in question, as well as distorted and erroneous impression in regard to the nature and operation of the law military, that it is believed that his views and declarations upon these points should not be allowed to pass without being analyzed, comprehended, and condemned by every patriotic citizen.

We propose briefly to show—

I. That the border State of Indiana, at the period in question, was in a position peculiarly calling for the exercise of the law of war in the case of rebels and their allies within her limits.

II. That Judge Davis's conception of that law, and of the province of the tribunals which are founded thereon, is altogether restricted, feeble, and false.

I. As to the condition of Indiana at the time of the arrest of the conspirators. Upon this subject Judge Davis makes use of the following remarkable language:

"The necessities of the service during the late rebellion required that the loyal States should be placed within the limits of certain military districts, and commanders appointed in them; and it is urged that this, in a military sense, constituted them the theatre of military operations, and, as in this case Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On *her* soil there was no hostile foot."

Now it is simply not true that there was "*no hostile foot*" on the soil of Indiana at the time referred to. And it is also not true that there were then only such military forces in that State as were merely "*collected*" there "*to be employed in another locality.*"

On the contrary, it is the fact that there were then many thousand *hostile feet* on the soil of that border State; and, further, it is the fact that there was a considerable army of United States troops then on duty and in active service against the public enemy within the State, and stationed and retained there for that purpose alone.

Let us look at the facts—the facts of record.

Before proceeding to consider the character and extent of the hostile element in this State at the period in question, we will state the amount of the military force on duty there, as it appears from the official returns.

Brevet Major General Hovey's official return of his command, dated August 31, 1864, is that which furnishes the most correct idea of the force in the district at about the time of

the arrest of Dodd, the Grand Commander of the Sons of Liberty in the State, and the principal of the conspirators.

At this date, the aggregate force is stated in the monthly report to have been seven thousand four hundred and fifty-four men and officers (7,454.) This force was employed in guarding the prisoners at Camp Morton—at this period returned as 4,834 in number—in repressing the outbreaks of the Sons of Liberty, enforcing the draft, arresting deserters, preventing raids, doing police duty at military posts, hospitals, &c. At the period of the arrest of Milligan, in October, this force had been considerably reduced, the conspiracy in aid of the rebellion having been meanwhile substantially checked by the arrests, trials, and other summary measures taken, and fewer troops being, consequently, needed in the district; but even at that date there was an aggregate of 4,156 United States soldiers still required there for service against the enemy.

Here, then, we have an utter refutation of the assertion of Judge Davis that, at the eventful period of the rebellion referred to, the only troops in Indiana were those who had been collected to be employed against the enemy in the rebel States—in that locality where, as the judge most mildly expresses it, "the laws were obstructed and the national authority was disputed." Instead of the case being as this high official represents it, we have the fact that a military force of between seven and eight thousand men—a force nearly as large as the entire effective army of the United States before the war—was employed *in the State*, whose chief duty was to suppress a most dangerous part of that very rebellion which their comrades were contending against in the field.

But let us better understand what was this hostile element required to be opposed, repressed, and watched in Indiana at this period.

It is now a well-known fact of history that the "Sons of Liberty," or "Order of American Knights," was a numerous, powerful, armed military organization, inspired by the rebellion, and engaged in co-operating in its design of overthrowing the General Government. This gigantic conspiracy had its "Supreme" and "Grand Commanders;" its "major" and "brigadier generals;" its "colonels" and "captains;" its "armies," "brigades," "regiments," and guerrilla "squads." From the testimony in regard to it, heretofore in various forms given to the public, it is ascertained that its force in the State of Indiana, where it was particularly powerful and demonstrative, was variously estimated at from 75,000 to 125,000 men; that it numbered in its ranks members of the State government and other prominent officials and citizens; that it enlisted the judiciary in its support, and that it commanded the influence and voice of newspapers of extended circulation. In regard to its armed force in Indiana, it is estimated that the arms in the possession of the Order in that State in the spring of 1864 consisted of about 6,000 muskets and 60,000 revolvers, besides private arms. General Carrington has stated in one of his official reports that in February and March, 1864, nearly 30,000 guns and pistols are believed to have been brought into the State for the use of the Order, this estimate being based upon an actual inspection of the invoices. In March a general order required by the impending danger was issued by the department commander, prohibiting the further importation of arms; and subsequently a large quantity of revolvers and 135,000 rounds of ammunition, which had been shipped to the firm in Indianapolis, of which H. H. Dodd, Grand Commander, was a member, was seized by the military; and other arms intended for the same destination were stopped and seized in New York. The objects of the Order were fully disclosed upon the trial of Dodd, Milligan, and their confederates. While their great scheme in aid of the rebellion, of releasing the rebel prisoners of war at the prison posts in Indiana, Illinois, and Ohio; seizing the military commanders and State officials; appropriating or destroying the public property, and overturning the authority of the Gen-

eral Government in those localities, was foiled by the energy of the Executive and the employment of a large and formidable military force, the Order was nevertheless able to carry out many of its most pernicious minor objects, and succeeded for a considerable period in seriously obstructing, and in some places altogether preventing the execution of the laws, and in setting the Government at defiance. It was in their resistance to the draft, and in their inciting desertion and harboring and protecting deserters, that they were perhaps most mischievous. Detachments of troops sent to arrest deserters or enforce the enrollment were resisted, attacked, and fired upon; enrolling officers were killed, books and papers connected with the draft were destroyed, and the raising of troops was resisted in every possible manner. At the same time every effort was made to induce soldiers to desert, and some idea of their success may be gathered from the statement in the report (of 1863) of the adjutant general of the State, that during one single month the number of deserters and absentees returned to the army, through the post of Indianapolis alone, was nearly two thousand six hundred. In their traitorous proceedings and resistance to the constituted authorities, the rebels of the Order had in some parts of the State such aid and comfort from the judiciary as the following: In one instance a disloyal judge held to trial, on a charge of kidnapping, certain military officers, who, in the proper performance of their duty, had arrested deserters, and the latter discharged altogether. In another case the chief justice of the State, in ordering an attachment to issue against a military officer, who had properly refused to give up a deserter sought to be released by writ of *habeas corpus*, declared that "the streets of Indianapolis might run with blood, but that he would enforce his authority against the President's order," under which the officer had justified his action. It is hardly necessary to add that, to execute the laws and orders of the Executive against these combinations, a large military force was constantly required to be employed or held in readiness; and those familiar with the difficulties encountered by Governor Morton at this period will remember how he was repeatedly obliged to call upon the military authorities for additional troops—urging at one time that the Indiana regiments be recalled from the field to suppress armed rebels in their own State. It should be further noted that the acts of these public enemies were directed not only against the officials of the Government and of the State, but against their own fellow-citizens; precisely as in the South, loyal men were persecuted, their property was destroyed, and in many cases they were driven from the country. As it is stated by General Carrington, in an official report, the full development of the Order in Indiana was followed by "*a reign of terrorism* among the Union residents of portions of Brown, Morgan, Johnson, Rush, Clay, Sullivan, Bartholomew, Hendricks, and other counties."

We have already seen that an army of United States troops was obliged to be held for active service in Indiana in the summer of 1864, and we now have some idea of the service for which they were needed. We also see that, if these troops had confined their attention to seeking for "hostile feet" across the border, the tens of thousands of hostile feet within the State would have overrun its territory; that its government, as well as the authority of the President, would have been utterly overthrown, and that Indiana would have become practically a *State in insurrection.*

But there were still other "hostile feet" in Indiana at this juncture. At "Camp Morton" there were about *five thousand rebel prisoners of war;* and these rebels, because of the constant incitements by which they were surrounded, by reason of the numerous plots being formed, as they were well aware, to effect their release, and with their aid to overpower the authorities, military and civil, and occupy the country, had been converted from submissive subjects into a most hostile and dangerous body. One not familiar with the details of the various schemes to release the rebel prisoners assembled in great numbers in the States of Indiana, Ohio, and Illinois, can with difficulty appreciate how con-

stantly the matter of guarding and holding these prisoners occupied the attention of the Executive, and how frequently during the last two years of the war he was obliged to take summary measures to counteract these combinations. As has been remarked, this wholesale delivery of the prisoners at Johnson's Island and at Camps Morton, Chase, and Douglas was a prominent feature in the grand scheme of revolution in which the "Sons of Liberty" in the northwestern States, with their rebel allies in Canada, were engaged in maturing. It is now notorious that C. C. Clay, jr., one of the chief agents of the rebellion in Canada, was actively enlisted in conspiracies of this class, and in his report of November, 1864, to Benjamin, the so-called Confederate Secretary of State, (heretofore published with the testimony upon the trial of the assassins of President Lincoln,) he alludes in the following terms to the case of one of these attempts, in which one Charles H. Cole, a rebel officer, and himself an escaped prisoner, had been a leader. "The truth is," says Clay, "he (Cole) projected and came very near executing a plan for the rescue of the prisoners on Johnson's Island." Another, and one of the most extended of these schemes, was that of Grenfell and his associates, in the fall of 1864, to release the rebel prisoners at Camp Douglas, and with their assistance to sack and lay waste the loyal city of Chicago. The execution of this plot was only prevented by the vigilance of the military authorities and the prompt and effective employment of the troops in the department; the chiefs of the conspiracy being promptly apprehended, brought to trial, and sentenced —some of them to death and others to terms of imprisonment. It is easy to understand how the constant agitation of projects of this character must have affected the prisoners themselves, and induced them also to assume the attitude of plotters and conspirators, held in restraint indeed for the time, but organized and prepared at the first opportunity to overpower their keepers, seize arms, and march out to kill and destroy. Thus were they eminently a "*hostile*" element, and as such in fact they were treated, guarded, and repressed. But formidable as they were, their presence is ignored entirely by Mr. Justice Davis in his description of Arcadian Indiana at this period.

There is yet another important fact which must enter into a proper consideration of the condition of Indiana at this juncture, and this is the fact, so lightly passed over by Judge Davis, of her liability to *invasion*. The adjoining State of Kentucky was full of predatory bands of partisans and guerrillas, and such leaders as Morgan, Syphert, Jesse, &c., when not actually making raids across the line, were constantly watching for an occasion to pass the river. From April, 1861, when the State of Kentucky declared herself *neutral* between the government and the public enemy, her soil became the favorite theatre for the operations of guerrilla warfare; and from February, 1863, when a Senator of Indiana was expelled from the United States Senate for complicity with the rebellion, there were never wanting citizens of that State ready at all times to welcome and entertain their guerrilla allies. It is well known that one prominent purpose of the "Sons of Liberty" was the encouragement and promotion of raids and predatory incursions upon the territory of the border States of the West. How the exposed and accessible frontier of Indiana became in the course of the war subjected to these invasions, of which the principal was that of Morgan and his army of guerrillas, is now a fact of history, and it is unnecessary to recapitulate here the circumstances of danger to life and loss of property to which the citizens of that State near the Ohio river were from time to time made liable. The subject is referred to to show that it was not merely the "*hostile feet*" of an enemy within her limits that the United States soldiers stationed in Indiana were called upon to stay, but those also of Kentucky guerrillas and rebels, who were prevented from overrunning the border at their will only by the vigilance and activity of our military commanders. It is agreed by Mr. Justice Davis that Indiana had been thus invaded *prior* to the arrest of Dodd and his accomplices; but because she was not at that moment invaded, he holds

that she could not be brought within the operation of the law of war. In another place it will be shown that this law may be resorted to not only when the sword of the enemy is thrust at the heart of the Commonwealth, but when it is being drawn from the scabbard; not only when active war is in our midst, but when it is impending, imminent, and only held back by force of arms. That war, when not actually waged upon the territory of Indiana, *was* always impending, is illustrated in no clearer manner than by the rebel raids which were constantly being projected or attempted against her.

We close here this part of the subject with the following recapitulation:

By a reference to facts of record and facts of history, it has been shown that the account given by Judge Davis of the condition and circumstances of the State of Indiana at the end of the summer of 1864—an account upon which he basis his argument that "martial law" could not legally be enforced within her limits—is wholly misconceived and mistaken.

His statement—to the effect that, at the period referred to, the United States forces in Indiana consisted only of such as were "collected" there "to be employed in another locality"—is exhibited as altogether erroneous by the facts of record: that there was then an army of between seven and eight thousand men stationed *for duty in the State;* that the duty required to be performed by these troops was such as only a state of war could have enjoined; and that, in addition to holding military posts, guarding prisoners of war, &c., this duty consisted in the protection of the frontier from constantly impending invasion, and in the forcible repression of a numerous and armed body of public enemies.

That his further statement—that at the juncture under consideration there was "*no hostile foot*" on the soil of Indiana—is shown to be equally erroneous by the facts: First. Of the presence within her territory of a formidable armed military organization, numbering at the least estimate, tens of thousands, in the closest alliance and co-operation with the rebellion, and engaged not only in plotting and conspiring to overthrow the Government, but in acts of overt treason, armed resistance to our military authorities, and a practical levying of war. Second. Of the presence there of some five thousand prisoners of war, rendered dangerously "*hostile*" because of the continual incitements from without to attempt to deliver themselves from restraint, and by reason of the extended plots to which (in connection with much greater numbers at Johnson's Island and other neighboring posts) they were parties, projected by the agents and allies of the rebellion, and contemplating a terrible *coup de main* against the authority of the Executive and the lives and property of loyal citizens.

That Mr. Justice Davis should have ignored in his opinion these signal facts is undoubtedly the most striking instance of a judicial *suppressio veri* in our annals.

The second branch of our criticism of the opinion will be presented in a separate article.

THE DECISION OF THE SUPREME COURT IN THE INDIANA CASE FURTHER CONSIDERED.

This opinion of the Supreme Court on one of the most momentous questions ever submitted to a judicial tribunal, has not startled the country more by its far-reaching and calamitous results than it has amazed jurists and statesmen by the poverty of its learning and the feebleness of its logic. It has surprised all, too, by its total want of sympathy with the spirit in which the war for the Union was prosecuted, and, necessarily, with those great issues growing out of it, which concern not only the life of the Republic, but the very progress of the race, and which, having been decided on the battle-field, are now sought to be reversed by the very theory of construction which led to rebellion. "Nasby,"

in referring to the cowardly and horrible massacre which some months since disgraced the capital of Louisiana, speaks of it as "the late unpleasantness at New Orleans;" and Mr. Justice Davis designates this rebellion, which has cost thousands of millions of treasure and hundreds of thousands of precious lives, as "our late troubles." Certainly, if he should hereafter be arraigned for the allusions to the bloody treason of the South which occur in the course of his argument, he could safely rest his defence on the well-known plea of *molliter manus imposuit.*

But, before proceeding to discuss the legal points determined by the Court, it is proper to observe that, although the narrative of facts set forth in a former article, as especially pertinent in demonstrating the *suppressio veri* noticeable in this opinion, was confined mainly to the condition of affairs in the State of Indiana, yet the restriction of presentation was in no sense necessary to maintain the legal position which we hold. That position is, that the rebellion was, in the fullest acceptation of the term, a national war, involving the whole country and the whole territory of the Republic, and that wherever, within that territory, the laws of war were violated by, or in the interest of, the public enemy, there appropriate military tribunals could be legally constituted with authority to repress and punish such violations.* State lines have no bearing whatever upon the question and should be utterly ignored in considering it. Justice Davis appears to believe that war consists only in the clash of arms, and that where the sound of the musket and cannon is not heard, there the laws of war are necessarily silent and inoperative. There could be no greater delusion. War may, at times, be prosecuted as vigorously by a masterly disposition of forces as by the most obstinate conflict in the field. It may be, and often is, powerfully supported in its prosecution through spies, guerrillas, and other emissaries and offenders against the laws of war, who, mingling with the troops and populations to be conquered, and acquiring and communicating information, and preying on unarmed and helpless citizens, serve the cause of the enemy more effectively than they could do in the ranks of the army. The most inviting and fruitful field for these criminal operations was often found, during the war, in States not declared in insurrection; yet, according to Justice Davis, such offenders, under such circumstances, if citizens, as they generally were, were necessarily beyond the reach of punishment; we say necessarily, because the civil tribunals have, as is well known, no jurisdiction of such violations of the laws of war, and an indictment for such a crime would be simply laughed out of court. Unless, therefore, the military court can intervene for the punishment of this most

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*In accord with this view, which was acted upon, throughout the whole course of the conduct of the war, by the administration which suppressed the rebellion, the well-known proclamation of Mr. Lincoln was issued, in 1862, denouncing against the offenses alluded to in the text the summary penalties which such violations of the laws of war properly merit. As it was upon this proclamation that the validity of the proceedings in these cases largely depended, it is here subjoined, as completing the record and supporting the reasoning which follows. It was in full force when Milligan was tried:

"BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

"A PROCLAMATION.

"Whereas it has become necessary to call into service not only volunteers, but also portions of the militia of the States, by a draft, in order to suppress the insurrection existing in the United States, and disloyal persons are not adequately restrained by the ordinary processes of law from hindering this measure, and from giving aid and comfort in various ways to the insurrection: Now, therefore, be it ordered, that during the existing insurrection, and as a necessary means for suppressing the same, all rebels and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to rebels, against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts-martial or military commission.

Second, That the writ of *habeas corpus* is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority, or by the sentence of any court-martial or military commission.

"In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

"Done at the city of Washington, this 24th day of September, A. D. 1862, and of the independence of the United States the eighty-seventh.

"ABRAHAM LINCOLN.

"By the President:

"WILLIAM H. SEWARD, *Secretary of State*"

dangerous class of criminals—and Justice Davis declares that it cannot, even with Congress authorizing and organizing it—they are secured absolute immunity, whatever may be the measure of their guilt. This is making of the Constitution a sanctuary for crime, instead of a shelter for the innocent. Such a doctrine is monstrous for its folly, if it be not criminal for the aid and comfort it gives to the spirit of the rebellion and for the insensibility with which it surrenders the bravest and truest of the nation's defenders to the machinations and mercy of the enemy.

It remains to present a few observations with respect to the second of the points which, in a former paper, were asserted as maintainable, namely:

II. That Judge Davis's conception of the law of war, and of the province of the tribunals which are founded thereon, is altogether restricted, feeble, and false.

With a view to illustrate this position, attention will be directed, in the first place, to some portions of the opinion of the majority of the court, which are deemed to call for criticism, and the residue of the remarks to be submitted will be devoted to some consideration of the sanctions for military commissions, deducible from the principles of the law of war, as incorporated in the Constitution of the United States.

It is worthy of remark that the solitary English authority which this opinion ventures to cite was so unsuitable for the particular purpose which it was required to serve, that its scope could only be made available by resorting to something which, with all deference, wonderfully resembles a perversion. The opinion states that the attainder of the Earl of Lancaster was reversed, "because he could have been tried by the courts of the realm." Is not this as near a misrepresentation as the ingenuousness of a grave bench should permit itself to approach? The fact is, as every student of the annals of that violent period knows, (we invite special attention to the difference between the above and the following,) the Earl's attainder was reversed on the ground that he, being brought to trial *in time of peace*, should not have been arraigned before any but the ordinary tribunals, whereas he was adjudged to death by a military court. It was expressly averred, in the assignment of errors, that "the same Thomas, of error and contrary to the law of the land, was *in time of peace* adjudged to death, notwithstanding that it is notorious and manifest that the whole time in which the said misdeeds and crimes, contained in the said record and proceedings, were charged against the said Earl, and also the time in which he was taken, and in which our said lord and father, the King, remembered him to be guilty, &c., and in which he was adjudged to death, was a time of peace;" and the old record proceeds, "nor did the same lord, the King, *in that time ever ride with standard unfurled;*" wherefore the petitioner, the Earl's brother, concluded by insisting that the said lord and father, the King, &c., *in such time of peace*, ought not against the same Earl thus to have, &c., &c. It was, indeed, alleged, in further illustrative description of the political condition of the time, and as evidence that peace prevailed, not only that the King "did not ride with standard unfurled," but that his courts were open; the real point made being, however, that the trial and condemnation by a military court in time of peace were against common right; and this will be found to have been the extent of the decision of Parliament.

Now, while the facts at the time the Earl of Lancaster was arraigned may have justified the dictum that "regularly"—that is, *generally*, *usually*—"when the King's courts are open it is a time of peace, in judgment of law," it is simply preposterous to apply that dictum to the days of the arrest of Milligan; for the people of the United States have a very distinct recollection, although the Supreme Court may have forgotten it, that in this land of ours, in 1864, it was very decidedly a time of war. And, indeed, of

what avail was it if those courts were open? The fact that they were unobstructed in this District, and generally in the border States, was only evidence of the efficacy of th military power that protected their existence; but how could this supersede or in any manner impair the authority of appropriate military tribunals to punish a class of offences over which these civil courts, thus open, had no jurisdiction whatever?

We repeat—the people, North and South, have an abiding conviction that 1864 was emphatically war time. Indeed, the Supreme Court, so long ago as December, 1862, scouted the idea of being asked "to affect a technical ignorance of the existence of a war which all the world acknowledges to be the greatest civil war known in the history of the human race, *and thus cripple the arm of the Government, and paralyze its power, by subtle definitions and ingenious sophisms.*" (2 Black, p. 669.)

It was not by any such blind fondness for the dead letter of antiquated precedents as this opinion of the majority evinces, that the people whose language and blood we inherit secured and preserved their liberties, but rather by recurring, whenever the emergency required, to a paramount supra-constitutional law—a mixture of force and regard to the national good. "They proceeded, not by the stated rules of the English Government, but by the general rights of mankind. They looked not so much to Magna Charta as to the original compact of society, and rejected Coke and Hale for Hooker and Harrington." (Hallam's Const. History, chap. 14.)

When the Supreme Court resort to a parliamentary phrase of the age of Edward the Third to persuade the people of this country to-day that the arrest and trial of Milligan and his co-conspirators were not ordered in the midst of a tremendous war, for war crimes committed in aid of the public enemy, that august bench may rest assured that they devote themselves to an undertaking more unreasonable, and destined to be less successful, than that whereby, according to the fable of the Sanscrit Æsop, the confederate rogues palmed off upon the pious Brahmin an ugly dog as a fine sheep fit for sacrifice. Let that bench, if willing to listen to a suggestion whispered more in sorrow than in anger, when they think to depreciate the magnitude and to underrate the duties of a conflict which will not cease till error is completely overthrown, be instructed by the fate of the presumptuous skeptics who deemed that flood not much of a shower which proved to all save the faithful a deluge, resistless in power, silent but refugeless in pursuit, relentless and indiscriminate in destruction.

This opinion, indeed, proceeds throughout, with complacent imbecility, upon the assumption that the gigantic slaveholders' rebellion could and should have been suppressed by the palsied arm of the civil power. It takes for granted, or argues with timid weakness, that the instrumentalities adapted to the correction of municipal offences are adequate to deal with an empire in arms. It would meet the far-reaching enterprises of a vast insurrection with the pacific agencies of the courts of law. It would conduct war on peace principles. It would arrest the emissary of treason, caught with incendiary torch firing a public building, and hold him to bail before a justice of the peace till a grand jury should indict him for arson. It would have proceeded against John Morgan by injunction, and have prevented the escape of Lee from Maryland by a *ne exeat*. There is nothing like it since Mrs. Partington ignominiously failed in her laudable attempt to check the tide of the Atlantic with her mop.

The opinion is either unfortunate or disingenuous in the allusion to the *Demarara case*, the remark concerning which seems calculated to convey the impression that Parliament condemned military tribunals. The fact is, that on the motion for an address to the throne invoking a disapproval of the proceeding by which Smith was adjudged guilty, the

House of Commons, on June 11, 1824, refused, by a majority of forty-seven, to adopt the views of Brougham and Mackintosh, which the Supreme Court cite. (Yeas, 146; nays, 193. See Hansard, vol. 11, new series.)

The opinion errs in stating that "all other persons," (*i. e.*, all persons not in the army and navy,) "citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury." This unqualified declaration ignores a catalogue of offences which, by whomsoever committed, have, from the earliest period, been punishable by military courts, by virtue of enactments, the constitutionality of which has been continually recognized in the administration of the Government.

By referring to the 56th and 57th Articles of War it will be seen—if those articles have any force, and their validity has never been questioned—that the amendments to the Constitution do not apply to "all persons," nor to "all citizens" of the United States; nor are they applicable to all circumstances and emergencies. Those Articles of War read as follows:

"ART. 56. Whosoever shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbor or protect an enemy, shall suffer death, or such other punishment as shall be ordered by the sentence of a court-martial."

"ART. 57. Whosoever shall be convicted of holding correspondence with, or giving intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as shall be ordered by the sentence of a court-martial."

These articles conferring this jurisdiction were adopted by the original Congress of the Confederation, and their terms and effect remained unchanged at the time of the formation of the Constitution.

In 1806 a slight modification in their language was introduced; the substitution of "whosoever" for "all persons;" and thus a Congress, composed of many of the original founders of the Republic, substantially reaffirmed the jurisdiction of military courts as to this class of offenders. The fact that no alteration has been made in them by any subsequent Congress, either in time of peace, or during any war in which the country has been engaged, may be regarded as an unmistakable indication that the amendments to the Constitution, confering the right of trial by jury, &c., must yield to such a vigorous exercise of the war power as may be essential to the preservation of the Government.

Again, by section 38 of chap. 75, (Act of March 3, 1863,) it was enacted:

"That *all persons* who, in time of war or of rebellion against the supreme authority of the United States, shall be found lurking or acting as *spies*, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, *or elsewhere*, shall be triable by a general court-martial or *military commission*, and shall, upon conviction, suffer death." (12 Stat., p. 737.)

Nor was this novel legislation. Our history is full of precedents for such provisions In the language of a distinguished lawyer, and public man:

"The struggle for our national independence was aided and prosecuted by military tribunals and martial law, as well as by arms. The contest for American nationality began with the establishment, very soon after the firing of the first gun at Lexington on the 19th day of April, 1775, of military tribunals and martial law. On the 30th of June, 1775, the Continental Congress provided that 'whosoever, *belonging to the Continental army*, shall be convicted of holding correspondence with, or giving intelligence to the enemy, either indirectly or directly, shall suffer such punishment as by a court martial shall be ordered.' This was found not sufficient, inasmuch as it did not reach those *civilians* who, like certain civilians of our day, claim the protection of the civil law in time of war against military arrests and military trials for military crimes. Therefore the same Congress, on the 7th of November, 1775, amended this provision by striking out the words, 'belonging to the Continental army,' and adopting the article as follows:

"'*All persons* convicted of holding a treacherous correspondence with, or giving intelligence to the enemy, shall suffer death or such other punishment as a general court-martial shall think proper.'"

"And on the 17th of June, 1776, the Congress added an additional rule:

"'That all persons not members of, nor owing allegiance to any of the United States of America, who should be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by the sentence of a court-martial, or such other punishment as a court-martial shall direct.'

"Comprehensive as was this legislation, embracing as it did soldiers, citizens, and aliens, subjecting all alike to trial for their military crimes by the military tribunals of justice, according to the law and usage of nations, it was found to be insufficient to meet that most dangerous of all crimes committed in the interests of the enemy by citizens in time of war—the crime of conspiring together to assassinate or seize and carry away the soldiers and citizens who were loyal to the cause of the country. Therefore, on the 27th of February, 1778, the Congress adopted the following resolution:

"'*Resolved*, That whatever inhabitant of these States shall kill, or seize, or take any loyal citizen or citizens thereof and convey him, her, or them to any place within the power of the enemy, or shall enter into any combination for such purpose, or attempt to carry the same into execution, or hath assisted or shall assist therein, or shall, by giving intelligence, acting as a guide, or in any manner whatever, aid the enemy in the perpetration thereof, he shall suffer death by the judgment of a court-martial as a traitor, assassin, or spy, if the offence be committed within seventy miles of the headquarters of the grand or other armies of these States where a general officer commands.'—*Journals of Congress*, vol. ii, pp. 459, 460.

"So stood the law until the adoption of the Constitution of the United States. Every well informed man knows that at the time of the passage of these acts, the courts of justice having cognizance of all crimes against persons, were open in many of the States, and that by their several constitutions and charters, which were then the supreme law for the punishment of crimes committed within their respective territorial limits, no man was liable to conviction but by the verdict of a jury.

"Washington enforced this just and wise enactment upon all occasions. On the 30th of September, 1780, Joshua H. Smith, by the order of General Washington, was put upon his trial before a court-martial convened in the State of New York, on the charge of there aiding and assisting Benedict Arnold, in a combination with the enemy, to *take*, *kill*, and *seize* such loyal citizens or soldiers of the United States as were in garrison at West Point. Smith objected to the jurisdiction, averring that he was a private citizen, not in the military or naval service, and therefore was only amenable to the civil authority of the State, whose constitution had guaranteed the right of trial by jury to all persons held to answer for crime. (Chandler's Criminal Trials, vol. 2, p. 187.) The constitution of New York then in force had so provided; but, notwithstanding that, the court overruled the plea, held him to answer and tried him.

"The whole people of the United States by their Constitution have created the office of President of the United States and Commander-in-Chief of the army and navy, and have vested, by the terms of that Constitution, in the person of the President and Commander-in-Chief, the power to enforce the execution of the laws, and preserve, protect, and defend the Constitution.

"The question may well be asked: If, as Commander-in-Chief, the President may not, in time of insurrection or war, proclaim and execute martial law, according to the usages of nations, how can he successfully perform the duties of his office—execute the laws, preserve the Constitution, suppress insurrection, and repel invasion?

"Martial law and military tribunals are as essential to the successful prosecution of war as are men and arms and ammunition.

"Hallam (Constitutional History of England) has said:

"'It has been usual for all governments, during actual rebellion, to proclaim martial law for the suspension of civil jurisdiction; and this anomaly, I must admit,' he adds, 'is very far from being less indispensable, at such unhappy seasons, where the ordinary mode of trial is by jury than where the right of decision resides in the court.'—(Const. Hist., vol. i, ch. 5, p. 326.)

"The Constitution of the United States has vested the power to declare war and raise armies and navies exclusively in the Congress, and the power to prosecute the war and command the army and navy exclusively in the President of the United States. As, under the Confederation, the commander of the army, appointed only by the Congress, was, by the resolution of that Congress, empowered to act as he might think proper for the good and welfare of the service, subject only to such restraints or orders as the Congress might give; so, under the Constitution, the President is, by the people who ordained that constitution and declared him Commander-in-Chief of the army and navy, vested with full

power to direct and control the army and navy of the United States, and employ all the forces necessary to preserve, protect, and defend the Constitution and execute the laws, as enjoined by his oath and the very letter of the Constitution, subject to no restriction or direction save such as Congress may from time to time prescribe.

"That these powers for the common defence, intrusted by the Constitution exclusively to the Congress and the President, are, in time of civil war or foreign invasion, to be exercised without limitation or restraint, to the extent of the public necessity, and without any intervention of the federal judiciary or of State constitutions or State laws, are facts in our history not open to question.

"That the power to proclaim martial law and fully or partially suspend the civil jurisdiction, federal and State, in time of rebellion or civil war, and punish by military tribunals all offences committed in aid of the public enemy, is conferred upon Congress and the Executive, necessarily results from the unlimited grants of power for the common defence."—(Hon. John A. Bingham: Argument on the Conspiracy Trial.)

A standard text-writer on the law military, alluding to the indispensableness of these tribunals, remarks as follows:

"In carrying on war in a portion of country occupied or *threatened to be attacked* by an enemy, whether within or without the territory of the United States, crimes and military offences are frequently committed, which are not triable or punishable by courts-martial, and which are not within the jurisdiction of any existing civil courts. Such cases, however, must be investigated, and the guilty parties punished. The good of society and the safety of the army imperiously demand this. They must, therefore, be taken cognizance of by the military power; but, except in cases of extreme urgency, a military commander should not himself attempt to decide upon the guilt or innocence of individuals. On the contrary, it is the usage and custom of war among all civilized nations to refer such cases to a duly constituted military tribunal, composed of reliable officers, who, acting under the solemnity of an oath and the responsibility always attached to a court of record, will examine witnesses, determine the guilt or innocence of the parties accused, and fix the punishment. This is usually done by courts-martial; but in our country these courts have a very limited jurisdiction, both in regard to persons and offences. Many classes of persons cannot be arraigned before such courts for any offence whatever, and many crimes committed even by military officers, enlisted men, or camp retainers, cannot be tried under the 'rules and articles of war.' Military commissions must be resorted to for such cases, and these commissions should be ordered by the same authority, be constituted in a similar manner, and their proceedings be conducted according to the same general rules as courts-martial, in order to prevent abuses which might otherwise arise.

"*Civil* offences cognizable by civil courts, whenever such loyal courts exist, will not be tried by a military commission. It must be observed, however, that many offences which in time of peace are civil offences become in time of war military offences, and are to be tried by a military tribunal, even in places where civil tribunals exist." (Benet on Military Law, p. 14, citing Major General Halleck, G. O., Department of Missouri.)

A mere enumeration of the offences, which, as experience has demonstrated, can only be appropriately dealt with and successfully punished and repressed by these tribunals, when perpetrated in the interest of the enemy in time of war, will furnish a striking confutation of the erroneous position of the Supreme Court, and will illustrate the foregoing remarks of Benet. Not to make a long catalogue, we may mention such offenders as: (1,) the assassins of the Commander-in-Chief in his capital, they being emissaries of the enemy; (2,) guerrillas; (3,) spies; (4,) those furnishing supplies or intelligence to the enemy. To these may be added such offences as (5) the forgery of soldiers' discharge papers by a clerk of the War Department, in Washington, when the city was surrounded and occupied by a large army, whereby the efficiency of the service was directly impaired; (6,) the kidnapping of a negro serving with the troops as an employee of the Quartermaster's Department; (7,) aiding and abetting the enemy by the public utterance of treasonable sentiments when the locality was in momentary danger of attack by that enemy. None of these offences could be adequately dealt with by the slow process of ordinary courts during a period of actual war, and of nearly all of them those courts are without jurisdiction. The following, from the Digest of the Judge Advocate General, will further

illustrate the folly of insisting that those tribunals are not demanded by necessity and warranted by principles interwoven with our fundamental law:

"There may be many acts denounced as crimes by the legislation of Congress and of the several States, and for which punishments are provided, with a view only to their being passed upon by the ordinary civil tribunals as offences against the persons or property of individuals, or the property or peace of the public, which, when committed in time of war and in the interest of the enemy, become violation of the laws of war and military crimes, properly cognizable by military commission. Thus, where a party holding a commission from the insurgent authorities, but proceeding secretly and in disguise, attempted, with certain others—all acting in the interest of the rebellion—to throw from a track a railroad train in the State of New York, for the purpose of destroying the lives and property of loyal citizens and possessing himself of information, to be communicated to the rebel authorities; held that although his act might be punishable by the civil courts as a violation of a local statute providing penalties for depredations upon railroads, he was properly brought to trial by a military commission for the far graver public and military offence in violation of the laws of war involved in the proceeding."

We shall resume the consideration of this subject to-morrow.

THE DECISION OF THE SUPREME COURT IN THE INDIANA CASE, FURTHER CONSIDERED.

The military commission is a rightful agency in *conducting* the operations of war, and the complete ignoring of this, one of its highest and most appropriate functions, by Mr. Justice Davis, is not the least conspicuous illustration of the specious shallowness of an opinion chiefly remarkable for the ingenuity with which it disregards the learning and authority produced upon the argument. The provisions of the Constitution which this opinion refers to, as forbidding the trial of persons not in the service by these tribunals, are not to be interpreted as if standing alone, but are to be construed in harmony with the other provisions looking to full exercise of the power of self-preservation. As the late able Attorney General (Mr. Speed) held:

"Trials for offences against the laws of war are not embraced or intended to be embraced in those provisions. If this is not so, then every man that kills another in battle is a murderer, for he deprives a 'person of life without that due process of law' contemplated by this provision; every man who holds another as a prisoner of war is liable for false imprisonment, as he does so without that due process of law contemplated by this provision; every soldier that marches across a field in battle array is liable to an action of trespass, because he does so without that same due process. The argument that flings around offenders against the laws of war these guarantees of the Constitution, would convict all the soldiers of our army of murder; no prisoners could be taken and held; the army could not move. The absurd consequences that would of necessity flow from such an argument show that it cannot be the true construction—it cannot be what was intended by the framers of the instrument. One of the prime motives for the Union and a Federal Government, was to confer the powers of war. If any provisions of the Constitution are so in conflict with the provisions to carry on war as to destroy and make it valueless, then the instrument, instead of being a great and wise one, is a miserable failure, a *felo de se*.

"A bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war. The soldier that would fail to try a spy or bandit after his capture, would be as derelict in duty as if he were to fail to capture; he is as much bound to try and to execute, if guilty, as he is to arrest; the same law that makes it his duty to pursue and kill or capture, makes it his duty to try according to the usages of war. The judge of a civil court is not more strongly bound under the Constitution and the law to try a criminal, than is the military to try an offender against the laws of war.

"*The fact that the civil courts are open does not affect the right of the military tribunal to hold as a prisoner and to try.* The civil courts have no more right to prevent the military,

in time of war, from trying an offender against the laws of war than they have a right to interfere with and prevent a battle. A battle may be lawfully fought in the very view and presence of a court; so a spy, a bandit, or other offender against the law of war may be tried, and tried lawfully, when and where the civil courts are open and transacting the usual business." (Opinion to the President, July, 1865.)

And the Supreme Court have, in a well-known case, long since taken such a view of the flexibility of our system as accords with that which Mr. Speed maintained, and which is the only one that deems the preservation of the national life the primary object of our organic law. "The powers of the Government," said Chief Justice Marshall, in delivering the decision in the case of McCulloch *vs.* The State of Maryland, "were given for the welfare of the nation; they were intended to endure for ages to come, and to be adapted to the various crises in human affairs. To prescribe the specific means by which Government should, in all future time, execute its power, and to confine the choice of means to such narrow limits as should not leave it in the power of Congress to adopt any which might be appropriate and conducive to the end, would be most unwise and pernicious." (4 Wheaton, 420.)

The military commission, it has been seen, is no novelty in the world. It is not of recent origin; it is not the offspring of revolutionary principles. It is a legitimate adjunct of that war-making power which is inherent in the fact of nationality. The right and the duty of self-preservation are inseparable from the idea of political existence as a sovereign State. That right and that duty impose upon those charged with the functions of government in a nation involved in war, the paramount obligation and the full authority to employ against the public enemy, whether foreign or domestic, all the weapons and agencies sanctioned by civilization. Hence flow the whole train of forces legitimately employed in modern warfare; hence is derived the capacity to declare and enforce *martial law*, which may be defined as the rule of military authority exercised in accordance with the laws and usages of war. Hence comes the power to resort to all the aggressive and coercive measures called for to vanquish a foe, and recognized as allowable in conducting hostilities. From this grand source is drawn the warrant for using any and every justifiable and customary appliance for making wars short, decisive, and therefore humane. With all such acknowledged means and machinery, military commissions stand on a common footing. The same natural, universal sanction which authorizes a belligerent to take innocent life on the battle-field, authorizes him to summarily punish the enemy guilty of violation of the fair laws of war, and the subject who abets the foe—criminals whom the ordinary courts are powerless to reach. This summary punishment, while it may, by the strict rules of the old unwritten code of war, be inflicted by the proper military commander without form of trial, is certain to be administered with an infinitely more careful and scrupulous regard for justice and right if deliberately reached through the institution of a sworn and impartial court, than if enforced by the arbitrary fiat of a general. The military commission, therefore, by substituting the determination of a judicial proceeding for the hasty order of a commander; issued, it may be, without opportunity for due investigation; extends to those accused of offences against the laws of war a degree of protection that renders this tribunal a humane and merciful agency, mitigating the harshness of the rigorous rules of martial usage. The natural, universal attribute of war-making sovereignty, the power of a belligerent, exercised in discharge of duty and restrained by the precepts of human civilization—this is the ample and solid sanction which upholds the institution of the military commission in every country and in every age.

"That the law of nations constitutes a part of the laws of the land must be admitted. The laws of nations are expressly made the laws of the land by the Constitution, when it says that 'Congress shall have power to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations.' To *define* is to give the limits

or precise meaning of a word or thing in being; to make is to call into being. Congress has power to *define*, not to make the laws of nations; but Congress has the power to make rules for the government of the army and navy. From the very face of the Constitution, then, it is evident that the laws of nations do constitute a part of the laws of the land. But very soon after the organization of the Federal Government, Mr. Randolph then Attorney General, said: 'The law of nations, although not specifically adopted by the Constitution, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modification on some points of indifference.' (See Opinions Attorney General, vol. 1, page 27.) The framers of the Constitution knew that a nation could not maintain an honorable place amongst the nations of the world that does not regard the great and essential principles of the law of nations as a part of the law of the land. Hence Congress may define those laws, but cannot abrogate them, or, as Mr. Randolph says, may 'modify on some points of indifference.'

"That the laws of nations constitute a part of the laws of the land is established from the face of the Constitution, upon principle and by authority.

"But the laws of war constitute much the greater part of the law of nations. Like the other laws of nations, they exist and are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress. No one that has ever glanced at the many treatises that have been published in different ages of the world by great, good, and learned men, can fail to know that the laws of war constitute a part of the law of nations, and that those laws have been prescribed with tolerable accuracy."—(Attorney General Speed.)

One further authority may be cited—the venerable name of "the old man eloquent." John Quincy Adams, than whom a purer man or a wiser statesman never ascended the chair of the Chief Magistracy in America, said in his place in the House of Representatives, in 1836:

"In the authority given to Congress by the Constitution of the United States to declare war, all the powers incident to war are by necessary implication conferred upon the Government of the United States. Now the powers incidental to war are derived, not from their internal municipal source, but from the laws and usages of nations. There are then, in the authority of Congress and of the Executive, two classes of powers altogether different in their nature, and often incompatible with each other, the war power and the peace power. The peace power is limited by regulations and restricted by provisions prescribed within the Constitution itself. The war power is limited only by the laws and usage of nations. This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, of property, and of life."

"The circumstances," said Hamilton,

"that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. * * * * This power ought to be under the direction of the same counsels which are appointed to preside over the common defence. * * * It must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defence and protection of the community, in any manner essential to its efficacy; that is, in any matter essential to the formation, direction, or support of the national forces."

He adds the further remark: "This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it, and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal—the *means* ought to be proportioned to the *end;* the persons from whose agency the attainment of any *end* is expected, ought to possess the means by which it is to be attained."—(Federalist, No. 23.)

And Madison asks:

"With what color of propriety could the force necessary for defence be limited by those who cannot limit the force of offence? * * * The means of security can only be regulated by the means and the danger of attack. * * * It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain, because it plants in the Constitution itself necessary usurpations of power."—(Federalist, No. 41.)

The only admissible restrictions are those which the enlightened sense of humanity dictates. And to that arbiter may safely be referred the whole record of the employment of this instrumentality by our late martyr-chief, who, ever tender toward suppliants and

always careful of life, proceeded so continually "with malice toward none and with charity toward all," that the defenders of his splendid and spotless fame can appeal with confidence from the *dicta* of a bench (as he, in that immortal edict which disenthralled four millions of souls, did from the temporary deprecations of time-servers) "to the considerate judgment of mankind and the gracious favor of Almighty God."

In at least one famous case, the intuitive instincts of the masses of our people, devoted to free principles, have revolted at the want of enlightenment in the tribunal which the instructed conscience and vigorous sense of the nation now again condemn. There is no wrong judgment which events are incapable of reversing. The American people are resolved to take this last decision under review. And they will bear in mind the memorable warning of their lamented Lincoln, delivered in his first inaugural:

"The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

The honorable and learned justice who was the organ of the majority of the court in the delivery of the opinion which has now been shown to be as deficient in knowledge of law as it is regardless of facts, and whose concurrence in the decision secured the preponderance of numbers in favor of the rulings adopted, was the life-long friend of the late Executive, and holds his high office at his hands. A comparison between the President and the judge, between the deeds of the former and the *dicta* of the latter, will certainly not disparage the memory of the dead, whether it may or not reproach the living. Associated at the bar, in talents and in solid requirements Lincoln was the peer of Davis. In experience, in acquaintance with affairs, no public trust found the former the inferior of the latter. In moral integrity the man is yet to speak who would venture to ascribe superiority to Davis. In the circumstances which surrounded Lincoln when he availed himself of the tribunals with which his name is identified, there will be found nothing to sustain the imputation that he was less imbued with the spirit of humanity, or less impressed with a sense of duty, or guided by less earnest perceptions of conscience, than Davis has been in rendering his decision against those tribunals. Yet the latter approaches the subject theoretically, with contracted vision and comprehension uninstructed by personal participation in the events of the war, treating a gigantic rebellion as a provincial attorney is accustomed to treat an action of assumpsit on a promissory note, and seeming to hold virtually, that the one is to be resisted with the same regard for small technicalities as the other; while Lincoln, sublimely presiding upon a theatre to which the eyes of all mankind were turned, the equal of Davis as a lawyer, and greater than he as a statesman, keenly alive to the occasion, and penetrated with a conscientiousness such as no public man in this or any other age has surpassed, approached the practical treatment of the same question with a courage and intelligence that showed him adequate for the crisis with which his name is bound up in history. While Davis's opinion in effect lends judicial sanction to the escape of such criminals as the members of the Northwestern conspiracy, and would seem to declare the faithful officers who tried and punished the murderers of the President to be themselves murderers for having done so—mark the infinitely higher plane of thought and action which Lincoln occupied, when, in presence both of the law and the extreme perils of the country, he measured the responsibilities imposed upon him, and grandly assumed them, with the memorable remark, "*Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of the wily agitator who induces him to desert?*" and saying: "*Yet he who dissuades one man from volunteering, or induces one soldier to desert, weakens the Union cause as much as he who kills a Union soldier in battle. Yet this dissuasion*

or inducement may be so conducted as to be no defined crime of which any civil court would take cognizance;" and adding, with a characteristic grasp of mind such as Mr. Davis seems incapable of appreciating, much less displaying: "*I can no more be persuaded that the Government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown not to be good food for a well one.*" (Letter to Erastus Corning and others, June 13, 1863, Raymond's History, p. 354.)

Content, therefore, to leave to the judgment of the thinking, loyal masses of this land the issue thus defined between the living lawyer, who neither in council nor the field participated in the war, and the revered statesman and patriot whose life was sacrificed by his labors to make that war successful, we conclude these observations by affirming the profound conviction that military commissions, upheld by sanctions deduced from the principles of the law of nations, engrafted in our Constitution, and employed with unshrinking confidence by Washington and Lincoln, may safely be left to be judged by those in whose hearts the memories with which those tribunals are identified lie forever enshrined, safe from the calumnies of direct or indirect traducers, and sanctified by precious blood that cannot have been shed in vain.

THE DECISION OF THE SUPREME COURT IN THE INDIANA CASE FURTHER CONSIDERED.

The peculiar views of the majority of the Supreme Court in the case of the Indiana conspirators have already been, in several articles, considered, and, as it is believed, shown to be without support in fact or in law. It is now proposed to examine the ruling in which the minority are understood to have concurred with the majority—that *under the specific terms of the act of March* 3, 1863, *ch.* 81, and independently of the political question of the jurisdiction of the military commission, Milligan and his associates were entitled to their discharge.

But, before essaying to construe the provisions of the statute, we desire, incidentally, to notice in a few words a position understood to be assumed, for it is not positively asserted, by the Chief Justice, that, while under the Constitution Congress might, by special legislation, have conferred upon the commission jurisdiction to pass upon the cases of the Indiana rebels, yet that, in the absence of such affirmative legislation, the jurisdiction could not properly be exercised.

Now, we hold—and this, as we understand, was the view uniformly maintained by the Executive from the beginning to the end of the war—that no legislation whatever was necessary for this purpose; that the jurisdiction in question was altogether independent of legislation; and that it was conferred by a law for the time paramount to legislation, to wit, *the common law of war.* Indeed, Congress itself, during the continuance of the rebellion, is seen to have proceeded upon this very theory. Fully informed as it was of the origin and existence of this court, and the number and importance of the cases, involving life and liberty, which were being constantly disposed of by it, it yet did not attempt or assume to create it anew, but recognizing it, as early as June, 1862, as an existing legal tribunal, authorized by the law of war, it proceeded to provide for the official safe-keeping of the records of its trials, and thereafter, in repeated enactments, approved its action and even enlarged its jurisdiction. Even so late as in July, 1866, did that body, in reorganizing the departments of the army, formally testify its estimation of the commission as a

necessary and valuable instrumentality of the war power of the Government. The frequency—as shown by the fact that its records are numbered by thousands—with which President Lincoln availed himself of its assistance, especially in border States, without once calling upon Congress to establish it upon any basis other than the law of war, is a pointed illustration of the view which has been entertained of its province. And the fact that his successor, at the outset of his term of office, gave his official sanction to its proceedings in the most important case ever brought before it, and continued to convene it for the trial of civilians in certain States, even after he had formally proclaimed the *status belli* to have ceased therein, is a further evidence that this species of tribunal has, from the beginning, been esteemed by the highest authority as in no manner the creature of mere legislation. The opinion which the Chief Justice would appear to entertain upon the subject is thus perceived to be in conflict with the entire course of legislative and executive procedure since the commencement of the rebellion. Deeming, as we do, that the argument for the authority and jurisdiction of the military commission, as derived from the common law of war, is an unanswerable one, we cannot but deplore that so impregnable a position should have been so tamely surrendered by the minority of the Supreme Court.

This incidental subject being thus noticed, we proceed to a consideration of the act of March 3, 1863, and of the ruling that the conspirators were entitled, by virtue of its peculiar provisions, to their release. Upon this point the court appear, as has been remarked, to be agreed; but the reasoning upon which their conclusion is founded is not presented, and no argument in regard to the question involved is set forth or alluded to. It is because of this absence, in the opinions delivered, of any illustration of the interpretation of the statute as made by these judges, that we more readily proceed to endeavor to show that the same it misconceived and erroneous, and should not be accepted by the court of final resort—the thinking and loyal community. And we undertake the attempt with the more confidence for the reason that the construction upon which we now insist is understood to be that which was adopted and acted upon by the military branch of the Government presently after the passage of the law in question.

The interpretation of the act by the court is, in brief, that any and every *citizen* of a State where the civil courts are in operation, held in confinement otherwise than as a prisoner of war, by the authority of the President, is entitled to relief under the act, *whatever be the nature or description of his offence*, whether an ordinary civil crime or one growing out of a state of war alone.

On the contrary, the construction which is maintained to be the proper one is that the statute, in providing for the release from arrest of certain public prisoners, *did not contemplate or intend to include the cases of prisoners held for military offences, or under sentences of military tribunals.*

Our grounds for claiming that this is the sense of the act are the following:

I. That the *description of persons* to be relieved, as set forth in the second section, though expressed in somewhat general terms, cannot *in view of the circumstances and emergencies of the civil war and rebellion then prevailing*, be held to embrace military offenders and convicts:

The description of persons referred to—those of whom lists are required to be furnished by certain executive officers to the judges of the United States courts, with a view to the discharge of such individuals as shall not be indicted, &c., by the grand juries of such courts—is thus worded:

"*All persons, citizens of States in which the administration of the laws has continued unimpaired in the said Federal courts, who are now or may hereafter be held as prisoners of the United States by order or authority of the President of the United States, or either of said Secretaries, in any fort, arsenal, or other place, as State or political prisoners, or otherwise than as prisoners of war.*"

Now it might perhaps plausibly be argued that Milligan and his accomplices, having been seized when engaged in a conspiracy in alliance with the rebellion, were practically *prisoners of war*, and so in terms excluded from the privilege of the act. But, without dwelling here upon any consideration of this character,—it is maintained that, although the phrase "persons held as State or political prisoners, *or otherwise* than as prisoners of war," is apparently a comprehensive one, yet only State or political prisoners, *strictly speaking*, could have been meant; that the last part of the clause, "or otherwise than as prisoners of war," was added only as a *limitation* of the first and principal part; that, inasmuch as prisoners of war, being held under and subject to the public law of nations, might in a general sense, be regarded as prisoners of the State, it was merely designed, by way of precaution, to except them in the general provision for State prisoners, thus leaving such

provision to apply to the latter alone, *as such;* and, *á fortiori*, that a third and altogether different class—military prisoners—in regard to whom the act is wholly silent, could have been in no manner in the contemplation of the framer of the law or of the Legislature.

That this third class was, at that period, an altogether distinct one—that it was as separate and distinct from the first as the first from the second—is made abundantly clear by the history of the times.

Beside rebel officers and soldiers captured in the field, the Government held in durance at that juncture *two* kinds of citizens. *The first* comprised that large class of "*Suspects*," who, in every war, and especially civil war, have been deemed proper subjects for detention and restraint. These were parties accused, generally, of "disloyalty," and so regarded as "dangerous;" parties compromised by a supposed connection with some plot against the Government; foreigners who were conceived to have forfeited their privilege as neutrals by a violation or attempted violation of the blockade or some branch of the law of nations; parties held as "hostages;' *soi-disant* "refugees," whose real character was not satisfactorily determined; persons detained against their will as "witnesses" in the cases of accomplices charged with violations of the public law; and, indeed, all parties temporarily confined for reasons of State policy, or whose cases were awaiting investigation, and the preferring, if the facts were found to warrant it, of specific charges.

Such were, in short, the "*State or political prisoners;*" such were the characters who made up the class whom the suspension of the writ of *habeas corpus* placed it in the power of the Executive legally to restrain, for the time, of their liberty, and to protect whom against a protracted confinement the act of March, 1863, was, with what must be pronounced a misjudged and misplaced charity, specially framed.

The *other* sort of citizen prisoners, held by the authority of the Government, was composed, as has been said, of persons whose status was entirely other than that of those just enumerated. These were: 1. Parties confined under formal charges for specific military offences, and with a view to their trial as soon as a proper court could be convened for the purpose. In this very numerous, and, as the war went on, constantly increasing class, were persons (principally residents of border States) accused as "spies," "guerrillas," or "bushwhackers;" those charged with "giving intelligence to the enemy," "holding correspondence with the enemy," "carrying rebel mails," "relieving the enemy with ammunition, money, or supplies," "harboring or protecting the enemy," "carrying on trade or intercourse with the enemy," "crossing the lines without authority," "violating flags of truce," or committing some other infraction of the laws of war. 2. Parties who had already been duly tried, convicted, and sentenced to imprisonment by duly constituted courts-martial or military commissions for these very offences; *and of this latter description were Milligan and his accomplices.* Of all these prisoners the great majority were *citizens*, the crimes above recited being such as would much more readily, and with much greater facility, be committed by persons not in the military service of the rebels, but left free to take advantage of any opportunity to serve those with whom they were in sympathy. No small proportion, however, of such prisoners were rebel officers or soldiers, (mostly also citizens of border States,) who, because of the very nature of their crimes—as, for instance, those charged with being *spies*—had, by the law of war, forfeited the right to be treated, when seized, as prisoners of war.

Now, in view of the clear and pointed distinction between these two great and important classes of citizen prisoners—military prisoners under charges or under sentence and prisoners of State confined temporarily and on suspicion—can it be supposed that an act so studiously and elaborately prepared as the one in question would, after carefully and accurately specifying the one class, satisfy itself with embracing the other merely under the general phrase "*or otherwise?*" If so particular to designate the mere *suspects*, would it not, if it had intended to include them, have designated with even greater precision the much more numerous and much more dangerous class of individuals charged by responsible military commanders with overt acts, or imprisoned for such acts under the deliberate final judgments of competent courts?

Again, in view of the detestable and formidable character of this class of prisoners, can it be supposed that a patriotic legislature would, by a general *jail delivery*, have turned them loose upon the community, to repeat their crimes—would, especially, have utterly disregarded the judgments of the tribunals by which those under sentence were condemned, and, without examining a line of the testimony upon which these judgments were founded, set the convicts free? Could such a legislature, though induced weakly to authorize the discharge of persons held for political reasons, have brought itself to the point of practically turning loose upon the community the guerrilla, the spy, the rebel incendiary, and the rebel assassin—of opening the prison doors to a Beal, a Kennedy, a Wirz, or a Payne?

II. Our second ground for holding that the act does not apply to prisoners held for or convicted of military offences, is the very *manner and form of the relief extended.*

The form of the relief is the committing of the cases to *civil* judges, to be passed upon by grand juries—the neglect or refusal of the grand jury, in any case, to indict or present the party for a *civil* offence entitling him to his discharge thereupon. But the crimes of the class of citizen prisoners under consideration were, in the great majority of cases, such as no *civil* tribunal or officer had or could have jurisdiction to indict or try; and would it not be to make Congress stultify itself, to hold that the failure of a grand jury to find indictments against a class of offenders whom the civil courts could not try, should be ground why such offenders should be released? But as the failure to find a bill of indictment is declared by Congress to be sufficient ground for the discharge of the prisoners who *are* the subjects of the act, is this not conclusive that the prisoners referred to, and intended to be relieved, were those amenable to the civil, and not to the military jurisdiction, and *those only?* From the very nature of things, it results that the class of crimes which are peculiar to a state of war cannot, in the absence of some special and extraordinary legislation, be adequately passed upon or punished by courts organized for the uses of a peace status. During the period of the war of the rebellion, no such legislation was resorted to, and the civil jurisdiction thus existed neither in fact nor in law. Moreover, not to dwell here upon the peculiar jurisdiction conferred by the law of war,—of a large number of the crimes last enumerated, *military courts* have been invested *by special statute* with jurisdiction, and with exclusive jurisdiction; and it is unwarrantable to suppose that a Congress of loyalty and intelligence could have determined to have reversed the entire course of legal and regular action in these cases, and placed their disposition in the hands of the civil judges.

Thus it had been provided, as long ago as in 1806, that all persons "*whosoever*," civil or military, who corresponded with or gave intelligence to the enemy, or relieved, harbored, or protected an enemy, as well as spies in time of war, should be punishable by court-martial; and the jurisdiction thus given was and still is exclusive. Among the military prisoners held by the Government at the date of chapter 81, of 1863, and since its date, there were and have been a considerable number of *citizen* offenders, charged with or convicted—as were W. T. Smithson and B. G. Harris, for instance—of these very crimes. But if the act of 1863 applies to military prisoners equally with prisoners of state, these offenders might all have been discharged under its provisions, no civil court or grand jury being empowered to take cognizance of their cases. Can it be claimed, with any show of reason, that this act had this effect, while yet neglecting to repeal, or make any allusion to, the well-known act of 1806?

Again—to take an illustration from the period subsequent to the passage of the law of 1863—in July, 1864, Congress, by special enactment, made inspectors of quartermasters' stores triable by court-martial or military commission for frauds and neglects of duty, and quartermasters' employees for receiving bribes; but it did not, as it had done in 1862 with contractors, make them a part of the army, but left them still *citizens.* In the same month, also, by a separate act, that body confirmed the jurisdiction of military commissions in the cases of guerrillas, and provided for the prompt execution of their sentences as imposed by such tribunals. Now, the authority best qualified to comprehend the legislation of a certain Congress is undoubtedly the Congress next succeeding, which—invariably in its Senate, and almost invariably in its Lower House—includes many members of the former body. That the Thirty-Eighth Congress, with their knowledge and understanding of the intent and extent of the legislation of the Thirty-Seventh, could have proceeded to commit to the jurisdiction of military courts cases which that legislation had committed, for final disposition, to the civil judges, would be a most unreasonable conclusion. And that they made the three enactments just referred to, without any repeal of chapter 81 of the act of 1863, certainly goes far to establish the fact that they did not regard that chapter as applying, in any manner, to prisoners held under the military jurisdiction.

It is here to be noted that the crime of Milligan and his associates was, as has been remarked in a previous article, a *military* one. For while their acts of conspiracy might, if committed in a time of *peace*, (a hardly supposable case, however,) have been properly cognizable by a civil tribunal, the same—when committed, as they were, in time of civil war, and under the inspiration and in the support of the public enemy, in a State in military occupation and constituting part of a military department, and in a locality constantly threatened with invasion—constituted a *military* offence, cognizable by the military jurisdiction, which, indeed, could alone properly or adequately try and punish the offenders. Just as the killing of the President, which, if it had occurred at a period of peace, would have been triable, like any other homicide, by the civil courts, acquired a quite different character in view of the circumstances of the war which was at the

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moment raging. For *then* it was no longer the murder of a citizen, but of the commander of an army in his own fortified camp; it was, moreover, the act of an emissary of the enemy, and was committed in the aid and interest of that enemy. It thus became a *military* crime, and, as such, was eminently one to be passed upon by a military tribunal.

III. A still further ground for the position that military prisoners and convicts are not reached, and were not designed to be reached, by the law of March, 1863, is found in *the terms upon which the release* of the parties, whose release is contemplated, *required to be made*. Thus, in the second section, it is specially enacted as a proviso to the discharge of the prisoner that he shall first take an "oath of allegiance to the Government of the United States, and to support the Constitution thereof; and that he or she will not hereafter in any way encourage or give aid and comfort to the present rebellion, or the supporters thereof."

And it is also further specially provided in the same section that the judge or court before which the prisoner is brought may, if it is deemed desirable in view of the peculiar circumstances of the case, oblige such prisoner "to enter into recognizance, with or without surety, in a sum to be fixed by said judge or court, to keep the peace and be of good behavior toward the United States and its citizens, and from time to time, and at such times as such judge or court may direct, appear before said judge or court to be further dealt with, according to law, as the circumstances may require."

Now, while it might be most appropriate that a State or political prisoner, arrested upon a suspicion, and set free because that suspicion has not grown into a legal presumption of guilt of any indictable civil offence, should be required to take an oath of allegiance or to give bonds to keep the peace before going at large, it is difficult to conceive of anything more inappropriate than such a requirement in the case of a prisoner convicted of, or charged with, or about to be tried for, a specific military crime. How preposterous, for instance, to require of a Kentucky guerrilla to give bonds to "keep the peace," or of a Maryland spy or rebel partisan raider to be of "good behavior?" How imbecile to oblige a "Confederate" agent, resident in Washington, whose business has been to collect information and convey it across the lines, and whose crime is, by the law of 1806, made punishable by a court-martial only, to enter into a recognizance to appear some time before a civil court, to be disposed of by the civil law. And how absurd gravely to enjoin upon any of these, or especially upon one whose very offence has been a "violation of his oath of allegiance," to subscribe a formal obligation of fealty as a condition to his discharge—to swear that he will not "encourage or give aid and comfort to the rebellion or the supporters thereof," when to be a rebel or an ally of rebels has been and is the very essence and purpose of his traitorous existence? It is impossible to believe that so enlightened and loyal a body of men as composed any of our Congresses during the war could have been so insensible to duty as to have imposed such futile conditions upon such a class of criminals, or that it could have so insulted the executive and judiciary as to require that these branches of the Government should carry out and record such impotent and farcical proceedings. In what manner an outraged community would have accepted the fact of the release, under the circumstances supposed, of some of these enemies of mankind, must be left to conjecture. How the victims of Andersonville might have entertained Wirz, set free upon his oath of allegiance, or the citizens of New York Kennedy, enlarged upon his promise to keep the peace and burn no cities, is a subject which happily need not now be considered.

We have thus presented those arguments suggested by an examination of the act of March 3, 1863, which appear most forcibly to sustain the construction proper, as we contend, to be given to its provisions, and most aptly to meet the ruling that not only Milligan and his confederates, but all military offenders, although under sentence of death or imprisonment, were entitled, merely because they were not "prisoners of war," to their discharge. If these arguments have any weight—and it is submitted that, based, as they are, upon facts of history and upon the soundest principles of construction, they must be entitled to consideration—we can only regret, if in fact they were urged upon the court by the counsel who represented the Government, that they were so little appreciated.